FILE COPY

Office Supreme Co
MAY 26 1
CHARLES ELMORE

Supreme Court of the United States

No. 116 October Term, 1929.

THE UNITED STATES,

Petitioner,

vs.

FELT & TARRANT MFG. CO.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THOMAS G. HAIGHT,
ROBERT H. MONTGOMERY,
J. MARVIN HAYNES,
Counsel for Respondent.

SUBJECT INDEX

	PAGE
1. Statement of the Case	1
2. Summary of Argument	2
3. Argument:	
(a) Point I. This case presents no public, special, or important question, or any question of the character which Rule 35 of this Court indicates will be considered as a reason for granting a writ of certiorari; it is an isolated case governed by its own peculiar facts	3
(b) Point II. The Court of Claims was correct in awarding a judgment for the respondent	6
4. Conclusion	8

Cases Cited.

Rand v. United States, 249 U. S. 503	5
Rock Island A. & L. R. R. Co. v. United States, 254 U. S. 141	5
Tucker v. Alexander, 275 U. S. 228	3
Union Metal Mfg. Co., 1 B. T. A. 295	8

IN THE

Supreme Court of the United States

No. 896—October Term, 1929.

THE UNITED STATES,
Petitioner,

vs.

FELT & TARRANT MFG. CO.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

This is a suit to recover excessive income and profits taxes paid by the respondent for the year 1917. It was heard by the Court of Claims on an agreed state of facts. In determining the respondent's tax liability, the Commissioner of Internal Revenue made no deduction for two items of patent depreciation or exhaustion actually sustained in the year 1917, the failure to make which deduction has resulted in an admitted overpayment of respondent's taxes for that year of $26,909.50 (R., p. 2). Judgment was awarded by the Court of Claims for that sum, together with interest (R., p. 18). The suit was resisted on the sole ground that the respondent had not filed a *sufficient* claim for refund. Within the statutory period, and before the respondent's tax liability was finally determined by the Commissioner, a claim for

refund was filed for much more than the amount sued for in this case. The Commissioner of Internal Revenue made no objections to the form of the claim, or otherwise, but a year after it was filed allowed the same to the extent of $17,050.55, rejecting the balance. No part of the sum thus allowed resulted from any deduction for the patent depreciation or exhaustion claimed in this suit. It was respondent's contention in the Court below that the Commissioner had waived any insufficiency in the claim for refund.

SUMMARY OF THE ARGUMENT.

I.

This case presents no public, special or important question, or any question of the character which Rule 35 of this Court indicates will be considered as a reason for granting a writ of certiorari; it is an isolated case governed by its own peculiar facts.

II.

The Court of Claims was correct in awarding a judgment for the respondent.

POINT I.

This case presents no public, special or important question, or any question of the character which Rule 35 of this Court indicates will be considered as a reason for granting a writ of certiorari; it is an isolated case governed by its own peculiar facts.

The only objection to the claim for refund is that it did not comply with the regulations of the Commissioner of Internal Revenue, in that it was *general* in its terms and did not mention the *specific* ground upon which the present suit is based.

This Court has already decided in *Tucker* v. *Alexander*, 275 U. S. 228, that the Commissioner of Internal Revenue may waive the insufficiency of a claim for refund. In that case, the taxpayer, *at the trial*, abandoned the grounds stated in its claim for refund and, indeed, those set forth in its complaint filed in the District Court. It rested its right to recover on an *entirely different* ground than any of those theretofore stated in the claim for refund or in the pleadings. The only difference between that case and the one at bar are the *facts* from which waiver is to be found.

If a waiver of the requirement of the regulations that "all the facts relied upon in support of the claim should be clearly set forth" (Rec. 62, Art. 1036) may be made *during the trial* and by a course of conduct there—as was the case in *Tucker* v. *Alexander*—it must necessarily follow that a waiver can be made *before suit is brought* and can be found to have been made by a course of conduct inconsistent with an intention to insist upon a compliance with the regulations. No reason can be conceived

why the validity of the exercise of the right to waive should be depended upon *when it is exercised, i. e., whether at the trial of an action or before a suit is brought.* This is more readily apparent when it is considered that the purpose of the statute and regulations, as stated by this Court in *Tucker* v. *Alexander*, was "for the convenience of government officials in passing upon claims for refund and preparing for trial."

This purpose was not only recognized by the Court of Claims but, together with the principle of waiver, was made the keystone of its decision (R., p. 15). There is, therefore, in this case no "important question of Federal law which has not been, but should be settled by this Court", nor has the Court of Claims "decided a Federal question in a way probably in conflict with the applicable decisions of this Court." Nor has it failed to give "proper effect to any applicable decision of this Court" or construed a statute which has not been authoritatively construed by this Court. These seem to be the only matters mentioned in Paragraph 5 of Rule 38, which are applicable to this case.

Turning now to the reasons advanced by the petitioner for asking a writ of certiorari, we find that it is first claimed that the Court of Claims was not justified in finding *"from the facts"* that the Court had waived any insufficiency in the claim for refund. We take it that this Court will not, except in very unusual cases, review the holdings of inferior courts *on questions of fact.*

It is next urged that the Court of Claims holds that "the taxpayer could sue on a basis not disclosed in its claim for refund, because it was known at the time the claim was filed that it was the Commissioner's policy to reject claims filed on such basis", and that such a hold-

ing is in conflict with the decisions of this Court in *Rand* v. *United States*, 249 U. S. 503, and *Rock Island A. & L. R. R. Co.* v. *United States*, 254 U. S. 141. In these cases, it was simply held that the statute required the filing of a claim for refund as a condition precedent to the bringing of a suit, and that, consequently, unless such a claim were filed, no suit could be brought. In the case at bar a claim was filed and this Court has held (*Tucker* v. *Alexander, supra*), that the *sufficiency* of such a claim under the regulations may be waived.

It is next urged that if there was no waiver, the Court below erred in awarding judgment to the respondent. The Court of Claims decision is in no way in conflict with that contention but, as it held there was a waiver the point is immaterial.

Finally, the petitioner contends that the decision of the Court of Claims, if allowed to stand, will result "in a multitude of claims for refund in general terms under which taxpayers may at any time raise new objections to taxes collected". The obvious answer to this contention is that when a claim in *general* terms is presented to the Commissioner of Internal Revenue, he may refuse to accept it because it does not comply with the regulations which require (Reg. 62, Art. 1036) that "all the facts relied upon in support of the claim should be clearly set forth under oath".

POINT II.

The Court of Claims was correct in awarding a judgment for the respondent.

The pertinent parts of the claim for refund were as follows (R., pp. 2, 10, 14):

> "The taxpayer has filed with the commissioner a claim for special relief under section 210 of the 1917 revenue act for the excess-profits tax assessed for this period.
>
> This claim is filed to protect *all possible legal rights* of the taxpayer, *pending*, and *at the date of*, the settlement of the claim for relief."

It will be noted that the respondent sought to cover by the claim "all possible legal rights" which it had *then pending*, as well as those which might exist if the Commissioner should determine that respondent was entitled to special relief under Section 210 of the Revenue Act of 1917. The Commissioner not only made no objection to the claim but, as before stated, acted thereon and a year later actually refunded to the respondent $17,050.55.

We submit that, the action of the Commissioner in (a) acting on the claim and making a refund thereunder and (b) failing to interpose any objection to the fact that it was insufficient under the regulations, constituted a waiver of his right to insist, after the time for filing a new one has expired, that the claim be more specific.

It will be borne in mind that the plaintiff is not seeking to recover on a ground different from that or those specified in the claim for refund, but is seeking to recover on a claim which was stated to be filed to protect "all

possible legal rights of the taxpayer'' *then pending* as well as those which might exist at the date of the settlement of its claim under Section 210. The only objection to the claim that there can be, is that it does not set forth "all the facts relied upon in support of the claim". In other words, that it is general rather than specific. But the fact that it was general and not specific was never objected to. As this Court said the statute and regulations pertaining to refunds were devised "not as traps for the unwary but for the convenience of government officials in passing upon claims for refund". If the generality of the claim in question was insufficient to enable the government officials to pass upon the claim, it was surely the duty of the Commissioner, instead of acting upon it, to ask for any further details that he might desire, or to require the plaintiff to make it as specific as possible.

Surely the failure of the Commissioner to object to the claim, coupled with his action in making a refund thereunder, was inconsistent with any intention to insist that it should be more specific; it was calculated, on the contrary, to induce a belief that there was an intention or purpose to waive any such requirement.

The case at bar presents much stronger reasons for applying the rule in respect to waiver than were present in *Tucker* v. *Alexander*. In that case, the plaintiff specified, not only in his claim for refund but in the complaint which he filed in court, certain grounds upon which he based his contention that he had paid more taxes than he should have paid, and it was not *until the trial* that he shifted his position and sought to recover on an *entirely different* ground, and presumably, an amount of money different than he would have been entitled to on the other

grounds. In the case at bar, the plaintiff presented a general claim to cover "all possible legal rights"; defendant made no objection to the generality but acted upon the claim, and now, when the time for filing a more specific claim has expired, he insists that the plaintiff is not entitled to recover an admitted overpayment of taxes, because the claim is not specific enough.

Moreover, as pointed out in the opinion of the Court of Claims, the failure to *specifically* claim a refund based on the failure to make a deduction for patent depreciation did not in any way prejudice the Commissioner, because it had been his settled policy to disallow any deduction for depreciation or exhaustion of patents, unless it was claimed in the *original* income tax returns, and it was not until long after the time for filing a claim for refund had expired that such policy of the Commissioner was reversed by the Board of Tax Appeals (*Union Metal Mfg. Co.*, 1 B. T. A. 295).

CONCLUSION.

It is therefore, respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

THOMAS G. HAIGHT,
ROBERT H. MONTGOMERY,
J. MARVIN HAYNES,
Counsel for Respondent.